FILE COPY

Office - Supreme Court, U. S.
FILED
APR 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF OF PETITIONERS

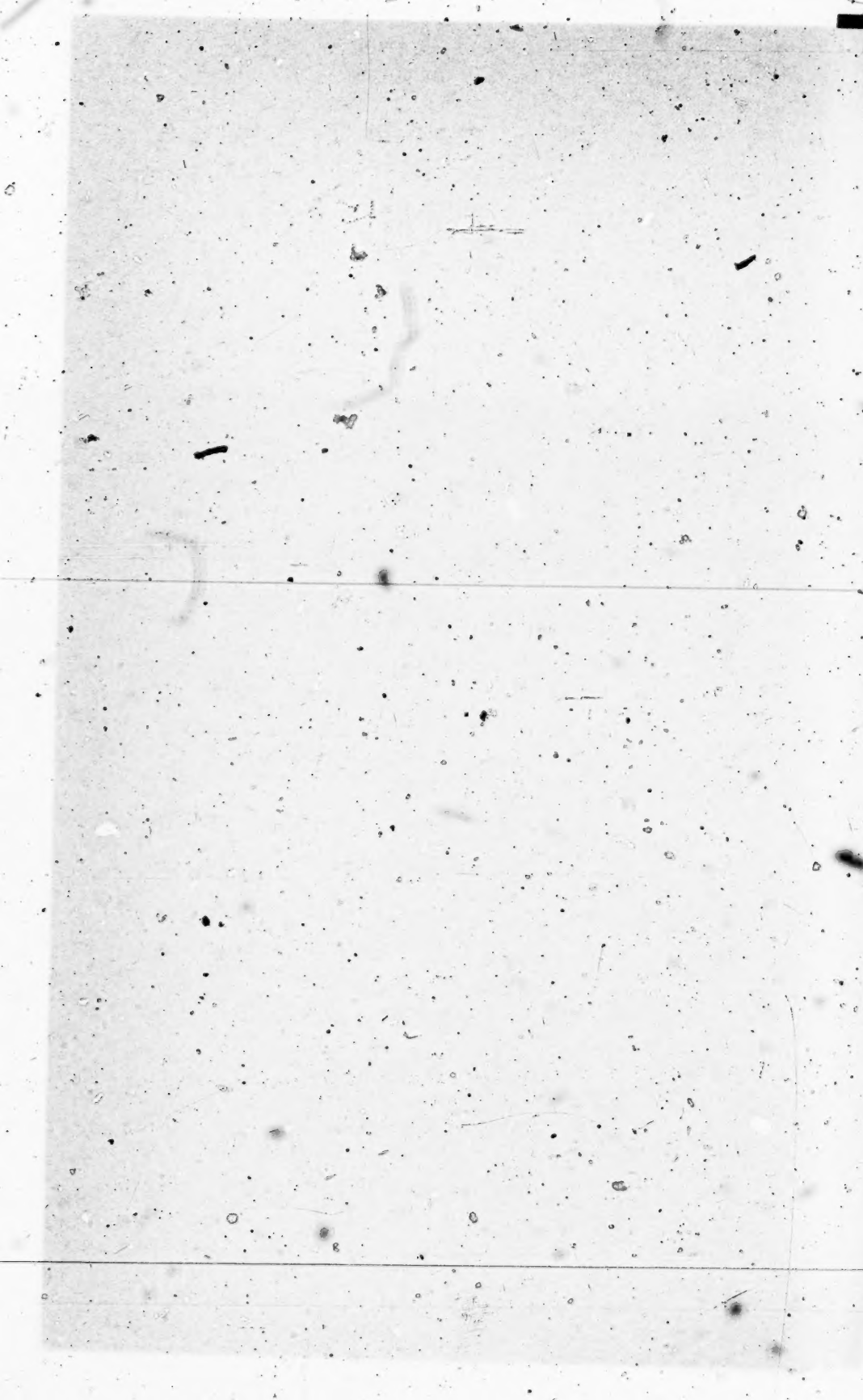
LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. E. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL
Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT
Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

April 4, 1945.



INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes	3
As to the Writ	3
As to the Merits	4
Statement	10
Outline of the Complaint	12
Summary of Argument	18
Part One	18
Part Two	19
Argument	24
Part One. As to the appropriateness of exercise of the common law writ of certiorari	24
I. The Court has power to grant the writ	24
II. In an anti-trust case the writ may be granted only by this Court	24
III. A traditional ground for exercise of the power has been to correct an excess of exercise of jurisdiction by the District Court	26

PAGE

IV. There are combined in this case the considerations of excess of exercise of jurisdiction below and public importance of the question presented 29

V. The imponderable factors 31

Part Two. As to the merits 33

I. The structure of the statute shows a Congressional determination to entrust to the Federal Trade Commission an exclusive primary jurisdiction over the question whether agreements or acts of export trade associations are violative of the Antitrust Laws ... 33

II. The decided cases in other fields recognize the principles under which the jurisdiction of the Federal Trade Commission must be exclusive in the field entrusted to it by the Congress 47

III. The intent of the Congress to that effect finds support in the circumstances of the time and was clearly expressed in the debates ... 61

(a) The surrounding circumstances when the Act was passed 61

(b) The Congressional Debates and Committee Reports 64

Conclusion 76

TABLE OF CASES

	PAGE
Abby Dodge, The, 223 U. S. 166	63
American Life Ins. Co. v. *Stewart*, 300 U. S. 203	27
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427	63
Board of Trustees v. *United States*, 289 U. S. 48	63
Brolan v. *United States*, 236 U. S. 216	63
Buttfield v. *Stranahan*, 192 U. S. 470	23, 64
Central Transfer Company v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469	51
Chetwood, In re, 165 U. S. 443	26, 27, 28
Enelow v. *New York Life Ins. Co.*, 293 U. S. 379	27
Georgia v. *Pennsylvania Railroad Company*, No. 11 Orig., Oct. Term 1944	20, 22, 25, 45, 57, 58
McClellan v. *Cartland*, 217 U. S. 268	27
McLean Trucking Company v. *United States*, 321 U. S. 67	22, 57, 59
Metropolitan, Ex Parte, Water Co., 220 U. S. 539	26
Northern Pacific, Ex Parte, Ry. Co., 280 U. S. 142	26
Paramount Famous Corporation v. *United States*, 282 U. S. 30	35
Peru, Ex Parte, 318 U. S. 578	24, 26, 28
Regina v. *Yarrington*, 1 Salkeld 406, 91 English Reports 353 (Q. B. 1710)	28
Roche v. *Evaporated Milk Association*, 319 U. S. 21	24
Simons, Ex Parte, 247 U. S. 231	27
Skinner, Ex Parte, & Eddy Corp., 265 U. S. 86	27
Sprague v. *Ticonic Bank*, 307 U. S. 161	28

PAGE

The King v. *The Justices of the West Riding of Yorkshire*, 5 Term Reports 629, 101 English Reports 352 (K. B. 1794) 28
The King v. *The Justices of Somersetshire*, 5 Barnewall & Cresswell 816, 108 English Reports 303 (K. B. 1926) 28
The King v. *Judge Clements*, [1932] 2 K. B. 535 28
The King v. *Middlesex Justices*, [1933] 1 K. B. 72 28
United States, Ex Parte, 287 U. S. 241 20
United States v. *Borden Company*, 308 U. S. 188, 11, 21, 52, 54
United States v. *California Co-operative Canneries*, 279 U. S. 553 ..... 24, 32
United States v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87 ..... 21, 22, 49, 50
United States v. *South-Eastern Underwriters Association*, 322 U. S. 533 ..... 19, 39
Virginia, Ex Parte, 100 U. S. 339 20
Weber v. *Freed*, 239 U. S. 325 64

STATUTES AND MISCELLANEOUS

Agricultural Marketing Agreement Act 52
Capper-Volstead Act 52, 53, 54
Clayton Act 9, 27, 35, 40, 46
Expediting Act 4, 24, 25
Federal Trade Commission Act 51
Judicial Code 3, 28
Judiciary Act of 1789, 1 Stat. 81 24

PAGE

Motor Carrier Act of 1935 60
Norris-LaGuardia Anti-Injunction Act 27
Robinson-Patman Act 35
Sherman Anti-Trust Act 8, 50
Webb-Pomerene Act 4, 33
Senate Reports 9 and 109, 65th Cong., 1st Sess. 68
Senate Report (No. 1056, 64th Cong., 2nd Sess.) (accompanying H. R. 17350) 67
House Report No. 50 (65th Cong., 1st Sess.) (accompanying H. R. 2316) 65
Cong. Rec., Vol. 54, Part 1, pp. 31, 32 66
Cong. Rec., Vol. 55, Part 3, p. 2785 61
Cong. Rec., Vol. 55, Part 3, p. 2786 69
Cong. Rec., Vol. 55, Part 3, p. 2788 70
Cong. Rec., Vol. 55, Part 4, p. 3570 69
Cong. Rec., Vol. 55, Part 7, p. 7326 72
Cong. Rec., Vol. 56, Part 1, p. 111 72
Cong. Rec., Vol. 56, Part 1, p. 119 73
Cong. Rec., Vol. 56, Part 1, p. 170 74
Cong. Rec., Vol. 56, Part 4, pp. 3564-3565 61
Cong. Rec., Vol. 62, Part 2, p. 2050 62
Federal Trade Commission Report entitled "Cooperation in American Export Trade" 64
Final Report of the Executive Secretary of the T. N. E. C., Senate Committee Print, 77th Cong., 1st Sess., p. 101 64
"The Export Trade Act", by the Department of Commerce (Bureau of Foreign and Domestic Commerce), p. 1 75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*, *Petitioners,* *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1016
CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*, *Petitioners,* *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1017

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 53-56) has not been reported.

JURISDICTION

Jurisdiction of this Court rests upon the provisions of § 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377). Further consideration of the question of jurisdiction will be included as Part One of the Argument. Concisely stated, the petitioners' view is that grant of the common law writ of certiorari is appropriate in the present case because it is (a) one of public importance in a field in which (b) appellate jurisdiction lies exclusively in this Court and not in the Circuit Court of Appeals, and (c) the question presented is whether the District Court acted in excess of its jurisdiction where (d) primary jurisdiction had been exclusively entrusted by the Congress to a federal administrative tribunal,—the Federal Trade Commission.

The petitioners assume that, in granting the writ, this Court has already determined that the questions presented are of public importance. The petitioners will also assume in this brief that the Court has already exercised its discretion as to the importance of the subject presented. We understood that the power to grant the writ and the importance of the question were conceded by the Solicitor General in his submission in opposition to the writ, and that the points upon which the Court wishes further argument relate to the element of *appropriateness* in the grant of the writ "at the present stage of the proceedings."

STATUTES

AS TO THE WRIT

Judicial Code

Act of March 3, 1911, c. 231, 36 Stat. 1087, 61st Cong., 3rd Sess. (S. 7031, Public 475), as amended.

§ 262 (28 U. S. C. § 377) Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

* * * * *

Sec. 24. (28 U. S. C. § 41) The district courts shall have original jurisdiction as follows: * * *

Twenty-Third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

* * * * *

Sec. 238. (28 U. S. C. § 345) A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination'

of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

Expediting Act

Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 57th Cong., 2d Sess. (S. 6773, Public 82), as amended by Act of June 25, 1910, c. 428, 61st Cong., 2d Sess., 36 Stat. 854 (H. R. 26233, Public 310).

Sec. 1. (15 U. S. C. § 28) In any suit in equity pending or hereafter brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, * * *.

Sec. 2. (15 U. S. C. § 29) In every suit in equity pending or hereafter brought in any district court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof; * * *.

AS TO THE MERITS

The Webb-Pomerene Act

Act of Apr. 10, 1918, c. 50, 40 Stat. 516, 65th Cong., 2d Sess. (H. R. 2316, Public 126).

Sec. 1 (15 U. S. C. § 61) The words 'export trade' wherever used in this Act mean solely trade

or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale. * * *

The word 'association' wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

Sec. 5 (15 U. S. C. § 65) Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, prac-

tices, management, and relation to other associations, corporations, partnerships, and individuals. * * *

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An Act to create a Federal Trade Commission', to define its powers and duties, and for other purposes.

The balance of § 5, and § 2, are next set out in parallel columns, showing their parallel employment of the same terminology:

§ 2 (15 U. S. C. § 62)	§ 5 (15 U. S. C. § 65)
Nothing contained in sections 1-7, inclusive, or section 15 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association,	*Earlier part of this section is printed above.*
provided such association, agreement, or act is not in restraint of trade within the United States,	Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States
and is not in restraint of the export trade of any domestic competitor of such association:	or in restraint of the export trade of any domestice competitor of such association,

Provided, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association

or which substantially lessens competition within the United States or otherwise restrains trade therein.

or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association,

or which substantially lessens competition within the United States or otherwise restrains trade therein,

it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommen-

dations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

Sherman Anti-Trust Act

Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended.

Sec. 1. (15 U. S. C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the the several States, or with foreign nations, is hereby declared to be illegal:

* * * * *

Sec. 2. (15 U. S. C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty * * *.

* * * * *

Sec. 4. (15 U. S. C. § 4) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Clayton Act

Act of Oct. 15, 1914, c. 323, 38 Stat. 730, 63d Cong., 2d Sess. (H. R. 15657, Public 212), as amended.

Sec. 1. (15 U. S. C. § 12) 'Antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen; and also this Act.

* * * * *

Sec. 11. (15 U. S. C. § 21) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

* * * * *

Sec. 15. (15 U. S. C. § 25) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

Sec. 16. (15 U. S. C. § 26) Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act * * * *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eight-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT

This case presents a question of jurisdiction under the Webb-Pomerene and Sherman Acts. It is a case of first impression. The precise question is whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity initiated by the Attorney-General under the Sherman Anti-Trust Act against an export trade association formed under the Webb-Pomerene Export Trade Act, which suit involves only acts done by, or in alleged combination or conspiracy with, such Association, in the

absence of a showing under § 5 of the Webb-Pomerene Act that the matter had been referred to the Attorney-General by the Federal Trade Commission.

In this case there had been no prior proceedings before the Federal Trade Commission or reference by the Commission to the Attorney General. Suit was instituted in the ordinary way under § 4 of the Sherman Act, by summons (R. 1) and complaint (R. 2) filed in the District Court on March 16, 1944.

On April 26, 1944, the petitioners in No. 1016 moved, pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure to dismiss the compaint on the ground that the District Court did not have jurisdiction of the subject-matter because exclusive jurisdiction was vested in the first instance in the Federal Trade Commission. It was stipulated on May 26, 1944, between plaintiff and the defendants (petitioners here) in No. 1017 (R. 52) that said defendants had filed a similar motion to dismiss.

The motion was argued before United States District Judge Coxe, and on December 26, 1944, he filed his opinion denying the motion (R. 53). The denial was principally upon the ground that the case was indistinguishable from *United States* v. *Borden*, 308 U. S. 188 (R. 55). An order was entered thereon on January 12, 1945 (R. 56), containing a provision as to the date upon which the defendants should answer, plead or otherwise move, and a further provision for an extension of time therefor in the event that this Court should grant a writ of certiorari. Although the record does not show it, an order, subsequent to the grant of the writ herein, has been entered by the District Court extending the time of the defendants to answer, plead or otherwise move until thirty days after the decision by this Court.

Petitions for writs of certiorari were presented for filing promptly with this Court,—in No. 1016 on January 17, 1945, five days after the entry of the District Court order, and in No. 1017 on January 23, 1945, and were followed by motions for leave to file. The writs were issued on March 5, 1945, cases Nos. 1016 and 1017 being consolidated for argument, and counsel being "requested to discuss in their briefs and upon oral argument the question of whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by a writ of certiorari under section 262 of the Judicial Code."

OUTLINE OF THE COMPLAINT

For the purpose of this motion the precise allegations of the complaint are of secondary importance. It is necessary only to appreciate that the Attorney General is charging agreements made and acts done by the various corporate defendants in combination and conspiracy with the export trade association defendants.

The first four headings of the complaint (I. JURISDICTION AND VENUE, II. THE DEFENDANTS, III. THE CO-CONSPIRATORS, IV. NATURE OF THE TRADE AND COMMERCE INVOLVED AND BACKGROUND OF THE CONSPIRACY) are introductory merely and do not directly affect the question. Summarized:

They define and describe the nature and constituents of alkalis and the processes by which they are produced.

And they name and identify the defendants, which are:

(1) The Alkali Export Association (known as Alkasso).

(2) The 11 other moving defendants in No. 1016—members of the Alkali Export Association.

(3) The California Association (known as Calkex)—another Webb Act Association—and its two members. These are the moving defendants in No. 1017.

(4) Imperial Chemical Industries, Ltd., which is the dominant chemical company in Great Britain, and its New York subsidiary of similar name, hereinafter together called ICI.

Also, the so-called "Co-Conspirators", viz.:

(1) American Potash & Chemical Corporation substantially all of the capital stock of which has been seized by the Alien Property Custodian.

(2) Belgian Solvay and its New York subsidiary of similar name.

(3) The German company, I. G. Farben.

Under V, "VIOLATIONS OF LAW", it is alleged that

"defendants Alkasso and ICI and those defendants who were members of Alkasso in 1924 * * * and the remaining defendants from the time of their respective admission as members * * *"

have been engaged in an unlawful combination and conspiracy. The theory is that the conspiracy consisted in joining the Association (Complaint par. 41, R. 11).

The particularized allegations of violations of law divide into three portions. The first is the portion dealing with alleged agreements with foreign interests (the "cartel agreements"). If jurisdiction be found, these may eventually present an issue as to the meaning of the main provi-

sion of the Webb-Pomerene Act that agreements and acts made by an association "in the course of export trade" are exempt from the Sherman Act.

The second and third portions of the complaint,—portions headed by the two sub-headings at pp. 31 and 37,—present an enquiry under two specific provisos of the Webb-Pomerene Act[1] and are entitled respectively "ALKASSO'S CONTROL OVER EXPORTS BY ITS DOMESTIC COMPETITORS" and "STABILIZATION OF DOMESTIC PRICES".

Considering these three parts in order:

(1) Alleged international cartel agreements.

Under the sub-paragraphs of paragraph 41 (R. 11) Alkasso, Calkex and "their respective members" are alleged to have agreed not to compete, and to accept assignment of marketing areas as their joint exclusive territory, and not to export to the territories assigned to the foreign companies, etc.

In par. 43 (R. 14) Alkasso and ICI are alleged to have agreed to refrain from exporting alkalies to the United States. Accordingly, says par. 44 (R. 14), Alkasso, "acting on behalf of itself and its members", entered into an agreement with ICI evidenced by a written memorandum attached to the complaint as Exhibit A. Allegations as to subsequent agreements by Alkasso with ICI throughout the years appear in pars. 44-52, (R. 14-20), and in the balance of the Exhibits.

Finally, in par. 53 (R. 22) it is generally alleged that each of the member companies participated in the negotiation of the agreements, accepted their benefits and obli-

[1]Numbered in our analysis of the statute, *infra*, as provisos (ii) and (iii).

gations, and participated in carrying them out. They are followed by particularization of Alkasso as the party which

> "allocated to each of its member companies a certain percentage of the total exports of alkalies comprising the Alkasso quota."

This is followed by the allegation that Alkasso,

> "to assure compliance by its members with the several agreements which Alkasso had entered into with defendants ICI and co-conspirators Belgian Solvay and I. G. Farben",

maintained until 1940 its position as exclusive foreign sales outlet for its members.

(2) Alleged restraints upon exports by domestic competitors.

Alkasso is alleged to have sought, by causing its member companies to do certain alleged acts, to restrain the competition of domestic companies which would otherwise have been its competitors for export trade. To that end Alkasso is alleged, in pars. 55, 56 and 57 (R. 23), to have caused the organization of a similar Association on the Pacific Coast known as Calkex, and to have entered into an understanding with Calkex agreeing upon market quotas, etc. In par. 59 (R. 25), we are told that the means for checking up on developments abroad was through "the foreign agencies or representatives of Alkasso and ICI". So far as Alkasso's members were concerned, they acted under the direction of Alkasso, which "*required* its members to report to it the names of all independent exporters * * *". And Alkasso is then charged with having exchanged information with ICI.

In par. 60 (R. 25) comes the express allegation of concerted action to eliminate competition from independent manufacturers. "Alkasso and ICI have taken concerted action as part of the conspiracy herein alleged to eliminate competition from such independent manufacturers". And Alkasso "has offered to act as the agent to handle the exports of such independent manufacturers or to purchase all of their alkalis to be exported * * *". Thus is Alkasso charged with having acted (to quote the statute) "in restraint of the export trade of any domestic competitor of such association".

Par. 60 (R. 25) concludes that by the acts aforesaid "Alkasso has succeeded in gaining control of most of the export trade of such independent domestic manufacturers * * *".

Par. 61 (R. 26) purports to analyze "the principal obstacle" which Alkasso has encountered in this alleged wrongful undertaking. Such principal obstacle was presented by the sales by independent dealers or exporters who had purchased their supplies from its members or from independent manufacturers. Alkasso is alleged to have met the obstacle by causing its own officers, agents and representatives abroad to investigate and police the sales; by requiring its members to refrain from selling to such exporters; and by instructing its agents abroad to undersell such independent exporters and to disparage the quality of their products.

(3) Alleged "Stabilization of Domestic Prices".

These allegations relate principally to alleged efforts to increase the price of caustic soda by taking an excessive supply off the domestic market. The means, R. 28, are

again "the agreements between Alkasso and ICI hereinabove set forth and (by) their practices thereunder". Alkasso is charged with having systematically allocated quotas between its members, and when the members were entitled to receive increases in their quotas, these were "given" to them by Alkasso. Reciprocally, reduced quotas were "accepted" by the defendant members, when Alkasso in its systematical allocation thought proper to reduce them.

The general scheme and structure of the whole pleading is that the head and center of the combination and conspiracy was in Alkasso itself and that Alkasso either directed, or at the very least was a participant in, every agreement and every act.

This makes it utterly impossible to disassociate any allegation of the complaint from the subject-matter which it would be appropriate for the Federal Trade Commission to undertake in carrying out its investigatory function under Section 5 of the Webb-Pomerene Act.

SUMMARY OF ARGUMENT

PART ONE

The case is an appropriate one for exercise of the common law writ of certiorari. Appellate jurisdiction in anti-trust cases is vested in this Court, and no question therefore arises whether it would have been appropriate to leave the parties to remedies in the Circuit Court of Appeals.

A traditional ground for exercise of the power has been to correct an excess of exercise of jurisdiction by the District Court. The writ is regularly used for this purpose in England. Although this Court has not fettered its discretion by any such established practice, the same type of case in which the writ has become regular practice in England remains an apt class within which this Court may exercise its discretion. This is particularly so if other favoring factors be present.

There are combined in this case the considerations of excess of exercise of jurisdiction below and public importance of the question presented. Indeed, there are combined in this case an unusual group of favoring factors, including: (a) absence of jurisdiction in the Circuit Court of Appeals, (b) a question of a character traditionally justifying the grant of the writ, (c) a question of public importance, (d) a novel question of law, and (e) a question in which a maximum saving of time in the case as a whole may be gained without requiring from this Court the consumption of time that would be necessary to consider an extended record.

PART TWO

I

The structure of the Webb-Pomerene Act shows a Congressional determination to entrust to the Federal Trade Commission an exclusive primary jurisdiction over the question whether agreements or acts of export trade associations are violative of the antitrust laws. The provisos in the Webb-Pomerene Act cover the entire field of § 1 of the Sherman Act, under which the Attorney General has brought this case.

The procedural § 5 of the Webb-Pomerene Act follows in identical language the substantive § 2. The procedural section thus covers the entire area covered by § 1 of the Sherman Act and entrusts supervision and control thereof exclusively to the Federal Trade Commission.

The presence in § 5 of an express provision for action by the Attorney General upon reference to him by the Federal Trade Commission negatives the existence of a different and earlier power in him to act.

No provision of the Sherman Act has been repealed. The Webb-Pomerene Act has simply provided that the substantive provisions of § 1 of the Sherman Act shall be procedurally protected by the Commission. The reason is that the field entrusted to the Commission—the field of export trade—intertwines with the field of domestic trade in the same way that interstate trade intertwines with local trade. *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533.

If the Attorney General had the jurisdiction which he claims, it would be a jurisdiction concurrent with or auxi-

liary to that of the Federal Trade Commission. Concurrent jurisdiction in two federal agencies is not to be favored on principle. And within the field of the antitrust laws, Congress has shown that it knows how to provide for concurrent or auxiliary jurisdiction of the Attorney General and of the Federal Trade Commission when it wishes to do so. It did so expressly in three sections of the Clayton Act (§ 2, 3 and 7) and by the procedural sections 11 and 15. The Clayton Act was passed only four years before the Webb-Pomerene Act.

But we do not rest our argument upon rules as to which of two possible constructions shall be favored. We submit that the explicit language of the Webb-Pomerene Act is inconsistent with any construction other than that the jurisdiction of the Federal Trade Commission is to be comprehensive and exclusive until the Commission shall itself refer its findings and recommendations to the Attorney General for such action thereon as he may deem proper.

In so providing, the Webb-Pomerene Act is an illustration of the modern principle that from an act of general application giving effect to the rule of competition as the general rule in commerce, a specific field of commerce may be carved out to be entrusted to an export commission appointed by law and informed by experience. That in such a case primary jurisdiction lies only in that commission, is established beyond dispute, and has recently been recognized by this Court in *Georgia* v. *Pennsylvania Railroad Co.*, Orig. No. 11, Oct. Term, 1944. That doctrine applies against the Attorney General just as it applies against other persons, unless Congress excepts the Attorney General from its application (as again Congress showed its capacity to do by § 16 of the Clayton Act).

II.

The Federal Trade Commission is different from any of the other government commissions in that its dominant function is within the field of the antitrust laws.

The Commission has particular functions just as the other agencies have (e.g. the Interstate Commerce Commission in respect of the national transportation system, or the Secretary of Agriculture in respect of agriculture). Its function in respect of export trade is an example. But, unlike the other commissions, the functions of the Federal Trade Commission are generally within the field of the antitrust laws.

It is therefore not surprising to find that the Webb-Pomerene Act is unlike the other acts of particular application (e.g. the Interstate Commerce Act or the Capper-Volstead Act) in that it entrusts to the jurisdiction of the commission, not a limited portion of the area covered by § 1 of the Sherman Act, but the entire area.

United States v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87 (dealing with the Interstate Commerce Act) is an express decision that the Attorney General's normal jurisdiction is ousted from whatever area is covered by the statute of particular application. On the other hand, *United States* v. *Borden Company*, 308 U. S. 188 (dealing with the Capper-Volstead Act and the Agricultural Marketing Agreements Act) is authority that within the area covered by § 1 of the Sherman Act, but not covered by the statute of particular application, the Attorney General retains his power and the District Court retains its jurisdiction. The problem in each case is to determine how far the statute of particular application goes.

The Webb-Pomerene Act is different from the Capper-Volstead Act in that the latter covers only one small segment of the area of § 1 of the Sherman Act, to-wit such restraints of trade as have the actual effect of enhancing prices (a subject-matter covered by a portion of one of the four provisos in the Webb-Pomerene Act). The *Borden* case is therefore distinguishable.

Deferment of possible criminal proceedings (not involved in this case), and rendering them subject to prior reference of the subject-matter by the Federal Trade Commission to the Attorney General, is also not ground for a forced construction of the express terms of the Webb-Pomerene Act. It is rather expressive of a policy of the Congress of the same character recognized in the *Pacific & Arctic* case, *supra*, 228 U. S. 87, under which the great problems which the Act was intended to solve and the great purposes it was intended to effect are considered of greater consequence than the facility given to some particular remedy.

The applicable principles have been recently reviewed in the Court's opinions in *Georgia* v. *Pennsylvania Railroad Company*, *supra*, Orig. No. 11, Oct. Term 1944 (particularly at Slip Opinion pp. 11-14), and in *McLean Trucking Company* v. *United States*, 321 U. S. 67, particularly at pp. 77-85.

III.

The surrounding circumstances when the Webb-Pomerene Act was passed are remarkably reminiscent of the present times. They constituted a background against which the Congress gave effect to the principle recognized by this Court that foreign commerce is an especially appropriate

field for the exercise of administrative rather than judicial power. *Buttfield* v. *Stranahan*, 192 U. S. 470, and cases following it.

The annals of the Congress conclusively show that such was the Congressional intention. Expressed in the House and Senate Reports, and in the address of President Wilson advocating the legislation, it was repeated in explicit terms by persons in charge of the bill (particularly and repeatedly by Senator Pomerene) that the Act was to confer upon the Federal Trade Commission full and exclusive primary power, both in the field of export trade, and over the problems that Congress realized would arise in the inevitable friction to be generated between the policy to be declared applicable to export trade and the contrary policy to be preserved for application in the field of domestic commerce.

ARGUMENT

PART ONE

AS TO THE APPROPRIATENESS OF EXERCISE OF THE COMMON LAW WRIT OF CERTIORARI

I.

THE COURT HAS POWER TO GRANT THE WRIT.

The availability of the writ, at least in cases other than anti-trust cases, is not open to question. Its use in furtherance of justice has been recurrent in the history of this Court since authority for its grant was provided by § 13 of the Judiciary Act of 1789, 1 Stat. 81; and the leading cases have been recently reviewed in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *cf. Ex Parte Peru*, 318 U. S. 578.

II.

IN AN ANTI-TRUST CASE THE WRIT MAY BE GRANTED ONLY BY THIS COURT.

The question in the present case is admittedly one of public importance,—"a significant one", as the government termed it in its brief in opposition to the grant of the writ (p. 11).

It is a question which cannot be considered in any Circuit Court of Appeals. Judicial Code § 238; 28 U. S. C. § 345. Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 15 U. S. C. § 28. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 558-9. The question, therefore, which divided the Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

In the Court's opinion in the *California Canneries* case emphasis was given to the Congressional policy to eliminate unnecessary delay in anti-trust cases. In pointing out that review was confined by the Expediting Act to "final" judgments, the Court's opinion is of course open to the construction that it was announcing a policy that in anti-trust cases review might never be had otherwise than from "final" orders. But this can hardly have been the Court's intention, for it would be strange if the one case in which § 262 might never be available were to be the very one to which Congress had given the particular recognition of importance represented by inclusion within the Expediting Act. It would be to say that the grant of an extraordinary common law writ is to be confined to cases not deemed by the Congress of sufficient public importance to be included within the terms of the Expediting Act. We suggest that the Court's opinion in the *California Canneries* case must, therefore, be necessarily read as excluding and reserving such questions as might call for application of § 262.

The consequences of a different reading might be grave. Suppose, for example, that a single District Judge were to grant in an anti-trust case a far-reaching preliminary injunction, or even a sequestration of property, under some plain misconception of law. A rule that review in anti-trust cases might never be had until "final" judgment might then lead to a denial of most substantial justice. And such a reading would be a misconstruction of § 262 itself. "It is elementary that repeals by implication are not favored." *Georgia* v. *Pennsylvania Railroad Company*, No. 11 Orig., Oct. Term 1944. There is no "clear repugnancy" between the Expediting Act and § 262. The policy of the Expediting Act in favor of interpretation by this Court of statutes

of particular public importance is happily consistent with the provision to this Court under § 262 of a wide power to make its jurisdiction effective "in furtherance of justice", *In re Chetwood*, 165 U. S. 443, 462.

III.

A TRADITIONAL GROUND FOR EXERCISE OF THE POWER HAS BEEN TO CORRECT AN EXCESS OF EXERCISE OF JURISDICTION BY THE DISTRICT COURT.

The present case is one to correct an alleged exercise of jurisdiction by the District Court in excess of its powers. This is a field in which the appropriateness of the writ was recognized by both the majority and dissenting opinions in *Ex Parte Peru*, 318 U. S. 578, the majority saying (at 583):

> "The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction * * *";

while the dissenting opinion selected for comparison, at p. 591, the leading case on exercise of the writ to correct excess of jurisdiction, *In re Chetwood*, 165 U. S. 443.

In the *Chetwood* case the Circuit Court had sought to restrain prosecution of an action in a State Court; in concluding the opinion of this Court, Mr. Chief Justice Fuller referred to the writ as appropriate "to correct excesses of jurisdiction", at p. 462. See also *Ex Parte Metropolitan Water Co.*, 220 U. S. 539; *Ex Parte Northern Pacific Ry. Co.*, 280 U. S. 142; *Ex Parte Virginia*, 100 U. S. 339, 343.

The rule has particularly appropriate application where the jurisdiction of a federal equity court is sought. It is

fundamental to all equity that it does not act if a common law writ is available; and it is fundamental to all federal courts that they must be heedful of the jurisdiction of the state courts. Assumption by a federal equity court of a jurisdiction that should have been left to the common law or to a state court has more than once provided occasion for issuance by this Court of this writ. In favor of the common law: *Ex Parte Simons*, 247 U. S. 231; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203. In favor of state courts: *In re Chetwood*, 165 U. S. 443; *McClellan* v. *Cartland*, 217 U. S. 268; *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86.

The Congress has itself shown an increasing tendency to limit the field of federal equity jurisdiction. The Norris-LaGuardia Anti-Injunction Act and the various Reorganization statutes are prominent examples.[2] And this policy has found a place within the anti-trust laws themselves, in § 17 of the Clayton Act, 28 U. S. C. § 381.

We are not of course arguing that the Congress has denied jurisdiction over anti-trust cases as such to the federal equity courts. The question on the merits in this case is whether it has done so in this particular class of anti-trust cases. For the purpose of argument as to the appropriateness of the writ, it is to be assumed *arguendo* in our favor that the Congress did not intend the District Court to have jurisdiction in this particular class of case. What we are here considering, is whether on that assumption the writ is the appropriate remedy.

---

[2] Popular distrust of Chancery procedure has its roots in the past and has taken many forms, from Chief Justice Coke's injunction against proceedings in Lord Ellesmere's Court to Dickens' exposure of *Jarndyce* v. *Jarndyce*.

A direct appeal from a district court to this Court, where the jurisdiction of the court was in issue, was permissible under § 238 of the Judicial Code (28 U. S. C. § 345) prior to its amendment in 1925 (Act of Jan. 28, 1915, c. 22, § 2, 38 Stat. 804; Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 938). The abolition of direct appeals in such cases did not curtail this Court's discretionary power, but rather emphasizes the appropriateness of its exercise where directed to a question as to the jurisdiction of the Court below. *Ex Parte Peru*, 318 U. S. 578, 585, n. 4.

In England one of the most common functions of the writ is to review orders of inferior courts made in excess of jurisdiction. *Regina* v. *Yarrington*, 1 Salkeld 406, 91 English Reports 353 (Q. B. 1710); *The King* v. *The Justices of the West Riding of Yorkshire*, 5 Term Reports 629, 101 English Reports 352 (K. B. 1794); *The King* v. *The Justices of Somersetshire*, 5 Barnewall & Cresswell 816, 108 English Reports 303 (K. B. 1926); *The King* v. *Judge Clements*, [1932] 2 K. B. 535; *The King* v. *Middlesex Justices*, [1933] 1 K. B. 72. While the writ has not been issued as freely by this Court as by the Court of King's Bench (*In re Chetwood*, 165 U. S. 443, 462), nevertheless the consideration that an allegation of excess of exercise of jurisdiction by the lower court is the usual ground for grant of the writ in England may aid this Court in determining when to exercise its discretion here. *cf. Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164-6.

IV.

THERE ARE COMBINED IN THIS CASE THE CONSIDERATIONS OF EXCESS OF EXERCISE OF JURISDICTION BELOW AND PUBLIC IMPORTANCE OF THE QUESTION PRESENTED.

We do not suppose that this Court will wish to adopt any firm rule binding the exercise of "sound discretion" (318 U. S. at 584) which has been its consistent guide in administering § 262; nor do we argue that either excess of jurisdiction in the Court below or the public importance of the question presented need alone suffice to support the issuance of the writ.[3]

What we do suggest, is that excess of exercise of jurisdiction by the Court below has been a familiar type of case for issuance of the writ, and that where that excess is exercised upon a question of public importance, the case for exercise of the Court's discretion becomes especially compelling.

Indeed, it seems that in the present case practically all of the factors are present that might occur upon any application for the writ; and we presume that it was because of the strength of the combination of the factors that the Court has in fact granted the writ. They include:

(a) That this is a case in which the circuit courts of appeal have no appellate jurisdiction and the appellate supervision of the district courts is accordingly the peculiar responsibility of this Court.

(b) That if the district court erred in the present case, its error lay in excess of jurisdiction.

---

[3] Although they were given as alternative reasons for grant of the writ in *Ex Parte United States*, 287 U. S. 241, 248-9.

(c) That if it erred, the error was committed in a case of "significant" public importance.

(d) That the question presented is a new one, and one in which that special doubt attaches to the jurisdiction which can only arise in a case in which for the first time the prosecuting officer is asserting the particular jurisdiction, notwithstanding that the statute under which he purports to act has been in existence for a quarter of a century and that it is in a field which, far from being overlooked or neglected, has been a major field of activity for the Department of Justice throughout the entire period.

(e) That a period of years may well elapse, as has so often been the case under the anti-trust laws, before final judgment; whereas the very fact that the case may come here upon the allegations of the complaint alone enables this Court to make a prompt disposition of the fundamental question presented.

To summarize, we have these factors, all persuasive upon the exercise of discretion:

(a) Remedy exclusive in this Court. Absence of the question whether application should first have been made to a Circuit Court of Appeals.

(b) A question of the character traditionally justifying grant of the writ.

(c) A question of public importance.

(d) A novel question of law.

(e) A question in which a maximum saving of time in the course of the case as a whole may be gained with-

out requiring from this Court the consumption of time that would be necessary to consider an extended record.

V.

THE IMPONDERABLE FACTORS.

We have attempted to assist the Court with an itemized analysis of particular factors that may weigh in the exercise of what in the end must be a general discretion. But if it be preferable to regard the problem as a whole, it becomes at once apparent that we are here dealing with a question so fundamental that, instead of the usual presumption applying against its review through an unusual form of procedure, the presumption may well be the other way.

If we ask ourselves what branch of the law is receiving greater public attention today, or calling for more extended attention on the part of this Court, or for more onerous or longer extended labors in the district courts, than the anti-trust laws, the answer must be: None. Bearing always in mind that the question of exercise of procedural discretion to grant the writ is to be approached upon the assumption that in the end the petitioner is in the right on the merits, the Court is presented with this alternative: Either to make a prompt disposition of a problem already now before it, or because of a procedural scruple to leave the Department of Justice and these 15 defendants and the 2 British-controlled defendants to an extensive trial, with all of the paraphernalia of procedure before trial and admission of voluminous evidence which characterize modern equity trials (at least in this field), and with the prospect of the case returning here after some years upon a record

as extensive, and as expensive, as it will be irrelevent to the question of jurisdiction now presented.

We do not suggest that the "procedural scruple" ought not to be entertained. It is indeed of importance that the gate not be opened to a flood of petty applications under § 262. On the other hand, it is equally plain that this Court is not going to adopt the alternative of rendering § 262 a dead letter.

Our submission, then, is this: That in a period when, consequent upon vastly increased appropriations, an alert and expanded personnel in the Department of Justice is striking out into new fields in the administration of the anti-trust laws, there must arise potent occasions for use of the practical instrument available in § 262 to guide the district courts on these new paths.

It must be perfectly evident that the legislative policy of expediting anti-trust suits recognized by this Court in the *California Canneries* case, 279 U. S. 553, has not had a happy history. The principal cause of the unfortunate prolongation of anti-trust suits has lain in the building up of the enormous records which have characterized this type of litigation. Although we do not by any means suggest that this Court will wish to inaugurate a habit of interlocutory review in such cases, we doubt that there would be any field in which occasional practical exercises of an undoubted power would yield larger public returns, or that in any event there could be a case more justifying an exercise of that power than the present case, presenting as it does what the Department of Justice has very fairly denominated a "significant question."

The Court is respectfully referred for a further exposition of these factors to our petition for the writ.

PART TWO

AS TO THE MERITS.

I.

THE STRUCTURE OF THE STATUTE SHOWS A CONGRESSIONAL DETERMINATION TO ENTRUST TO THE FEDERAL TRADE COMMISSION AN EXCLUSIVE PRIMARY JURISDICTION OVER THE QUESTION WHETHER AGREEMENTS OR ACTS OF EXPORT TRADE ASSOCIATIONS ARE VIOLATIVE OF THE ANTITRUST LAWS.

The Webb-Pomerene Act differs from all of the other related statutes in this respect,—that its language embraces the entire structure of § 1 of the Sherman Act.

The statutory theory is that

(1) The Sherman Act confers upon the district courts jurisdiction of suits brought by the Attorney General to enjoin restraints of interstate and foreign trade, and confers upon the Attorney General the power to bring such suits. A principal function of the Sherman Act was to confer a jurisdiction which did not previously exist in the district court, at the suit of the Attorney General.

(2) The Webb-Pomerene Act then removed from the scope of the Sherman Act and of the Clayton Act the field of foreign commerce to the extent that it might be occupied by export trade associations and their agreements and acts. This removal applies both as to the substantive restraints and as to the procedural conferment of jurisdiction on the district courts at the suit of the Attorney General.

(3) To the exception which the Webb-Pomerene Act thus carved out of the jurisdiction conferred by the Sherman Act, there were annexed *provisos* limiting the immunity of the associations and of their acts and agreements. These provisos were four in number:

(i) That the association, agreement or act should not be in restraint of trade *within* the United States,

(restraint outside the United States indeed being the very reason for the enactment).

(ii) That the association, agreement or act should not be in restraint of the export trade of any domestic competitor of such Association.

(iii) That no act or agreement of the association should artificially or intentionally enhance or depress prices within the United States of the commodities of the class exported by such association,

(artificial and intentional enhancement or depression of prices outside of the United States being by necessary implication permitted).

(iv) That no act or agreement of the association should substantially lessen competition within the United States or otherwise restrain trade therein.

(i) and (iv) are the same in substance, and amount to a general proviso against restraint of trade within the United States. They follow either directly the language of the

Sherman Act, or indirectly the gloss that has been put upon the statute by the decisions of this Court,[4] or the gloss put upon the Sherman Act by the substantive provisions of the Clayton Act[5] and the Robinson-Patman Act of June 1936 (49 Stat. 1528, 15 U. S. C. § 13 (a)).

(ii) and (iii) are more specific provisos, both of which also flow naturally from the nature of the Webb-Pomerene Act. The purpose of the Act was to permit restraints of trade in foreign markets. Proviso (ii) forbids restraint of other Americans wishing to export, and proviso (iii) prevents artificial or intentional raising or depressing of prices within the United States.

The problem is as to what government agency or officer first administers the complex questions that arise out of this statute. That question is dealt with in §5 of the Webb-Pomerene Act (15 U. S. C. §65). In its first paragraph it spells out in detail the provisions for filing with the Federal Trade Commission of full data and information upon the export trade associations and their agreements and activities, and provides the penalties for their failure so to file. The definition of the subject-matters upon which in-

---

[4]For example, in *Paramount Famous Corporation* v. *United States*, 282 U. S. 30, the preservation of competition was stated to be the purpose of the Sherman Act. Compare the phrase in the Webb-Pomerene Act "substantially lessens competition".

[5]Characteristic language of the Clayton Act being "* * * where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce". (Act of October 15, 1914, ch. 323, § 7, 38 Stat. 731, 15 U. S. C. § 18. See also 15 U. S. C. § 13, § 13a, § 14).

formation is to be filed is a wide one, indicating the breadth of the Commission's jurisdiction, for it requires information

> "as to its organization, business, conduct, practices, management, *and relation to other associations, corporations, partnerships, and individuals.*"

The italicized portion is of particular materiality to our case.

The second paragraph of §5 (15 U. S. C. §65) follows in identical language the substantive §2 (15 U. S. C. §62) and entrusts to the Federal Trade Commission the entire complex question of delimitation between the general exemption provided by the statute and the four specific provisos. We have printed, *supra*, in parallel columns the language of the substantive section (§62) and of the second paragraph of the procedural section (§65), from which it will be seen that there is no question arising under the substantive section which is not by the procedural section entrusted to the jurisdiction of the Federal Trade Commission. Read together the two show an unquestioned Congressional intention that export trade associations and their acts and agreements should not be the subject-matter of independent prosecution by the Attorney General except after investigation and reference to the Attorney General by the Federal Trade Commission.

This conclusion is given emphasis by the fact that instead of merely omitting a conferment of jurisdiction upon the Attorney General, the procedural section of the Webb-Pomerene Act does expressly confer a certain, yet limited, jurisdiction upon him. There are two heads for such jurisdiction. Under the first paragraph of the procedural section, it becomes the duty of the Attorney General to direct

the District Attorneys in the collection of penalties and forfeitures for failure to provide the statutory information to the Federal Trade Commission. And in the second paragraph there is conferred upon the Attorney General the power to take such action as he may deem proper, but not until

(1) an alleged violation of law by the Association, or in consequence of its acts or agreements, which

(2) has been investigated by the Federal Trade Commission;

(3) recommendations have been made by the Commission;

(4) the Association has failed to comply therewith; and

(5) the Commission has referred its findings and recommendations to the Attorney General.

In this case we stand at the threshold of an inquiry into the question whether an export trade association, and its members and the parties with whom it makes its agreements, have so acted as to violate one or more of the provisos to the Webb-Pomerene Act.

But to overstep one or more of the provisos of the Webb-Pomerene Act is precisely the same as to violate the Sherman Act. This is so because the provisos to the Webb-Pomerene Act cover the whole field of the Sherman Act with respect to the domestic activities of export trade associations, their agreements and acts.

Such an inquiry is therefore within the jurisdiction entrusted to the Federal Trade Commission.

The Attorney General's position, on the other hand, is a simple one. "It is my duty to enforce the Sherman Act,"

he says: "These parties are violating the Sherman Act." We agree that this would be so if there were no other applicable Act of Congress since the Sherman Act. But the Webb-Pomerene Act is such an Act.

The Sherman Act is, we admit, an Act of *general* application. It covers the whole field of commerce. But obviously the Congress can make *specific* exceptions for specific fields of commerce. The Attorney General must admit that the Webb-Pomerene Act is a specific act, and that its specific subject-matter is

> Export Trade Associations.
> Their Agreements.
> Their Acts.

The Attorney General must also admit that the Congress has not merely (in a negative way) excepted this specific subject-matter from the application of the Sherman Act. The Congress has (in an affirmative way) continued this subject-matter under Federal control, but has entrusted that control in the first instance specifically to the Federal Trade Commission.

This is not therefore a question of repeal by implication at all. No *substantive* statute has been repealed. What has been done, has been to entrust a *procedural* power to a particular commission.

None of these points can possibly be disputed by the Attorney General. He must admit that, at least to some extent, the Federal Trade Commission has been given a jurisdiction from which he has been excluded. The undisputed extent of this jurisdiction is the field of activity of the Association, *and its acts and agreements in the course of export trade and commerce.*

The question that really arises is whether there is an implied exception in favor of the Attorney General so far as the provisos in the Webb-Pomerene Act are concerned.

The fact of economic life that gives rise to the difficulty is that all trade and commerce at least to some extent interrelates. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; more specifically, that an association, even if formed for the primary purpose of export trade, may affect domestic trade; that the same is true not merely of its own acts, but of the agreements that it makes with others and the acts that it causes its members to engage in; that they may even amount to a deliberate attempt to violate otherwise applicable provisions of the Sherman Law.

All these possibilities we admit as economic realities. All these possibilities, we admit, are alleged by the government to have actually occurred in this case.

But the question remains: Who regulates them? (a) Is it the Attorney General because they would constitute violations of the Sherman Act? (b) Or is it the Federal Trade Commission because the Webb-Pomerene Act has expressly entrusted it with the power?

To this question the Attorney General will doubtless answer: "Both." He will doubtless say: "I do not dispute the conferment of jurisdiction by 15 U. S. C. § 65 on the Federal Trade Commission in this instance. What I do say, is that I have a concurrent jurisdiction."

So the question reduces itself to this: Does the Attorney General have a jurisdiction concurrent with and in addition to that of the Federal Trade Commission?

To this the answer is that the Congress has shown that it knows how to provide for concurrent jurisdiction when it

wishes to do so. Examples within the antitrust laws themselves are §§ 2, 3 and 7 of the Clayton Act. By § 11 (a procedural section) authority to enforce compliance was vested in various Federal commissions (as to railroads, in the Interstate Commerce Commission; as to radio, in the Federal Communications Commission; as to aviation, in the Civil Aeronautics Board; as to banks, in the Federal Reserve System; and otherwise, in the Federal Trade Commission). In each case, a full procedure was spelled out, with eventual jurisdiction in the Circuit Courts of Appeal to enforce at the suit of the appropriate commissions. There is no reference to the Attorney General in § 11. But independently, and in addition, it was expressly provided in § 15 of the Clayton Act that the several district courts were invested with jurisdiction over the same subject-matter, and that it should be the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to enforce it.

Here is a true case of concurrent jurisdiction, specifically conferred by statute—and in the same group of statutes with the Webb-Pomerene Act—*i.e.* in one of the antitrust Acts.

But if the Attorney General had some sort of inherent jurisdiction to enforce the antitrust Acts, it would have been unnecessary for the Congress to confer it upon him or upon the district courts in respect of the Clayton Act.

And the Clayton Act was enacted in 1914,—just 3 years before the Webb-Pomerene Act,—and in the same prevailing legislative atmosphere—the period of the Wilsonian "New Era". It cannot be said that the Congress did not, when debating and passing the Webb-Pomerene Act, have fully in mind the precedent of the Clayton Act.

Yet the Webb-Pomerene Act follows an entirely different theory from the Clayton Act. No general jurisdiction is conferred upon the Attorney General or the district courts. There is a specific conferment of jurisdiction on the Federal Trade Commission. But instead of providing that after the Federal Trade Commission has completed the investigation, it shall seek to enforce its order in the Circuit Courts of Appeal, the provision is that it shall, if it shall conclude that the law has been violated, and if the Association shall have failed to comply with its recommendations, refer its findings and recommendations to the Attorney General for such action as he shall deem proper.

Here is a *consecutive*, not a *concurrent*, jurisdiction. The Attorney General is assigned a specific role to be played by him at a specific time—when the Federal Trade Commission shall have acted.

Omission by the Congress of provisions in the Webb-Pomerene Act similar to sections 11 and 15 of the Clayton Act is expressive of an intention not to provide a concurrent jurisdiction. Nor would there be any reason for the Courts to adopt a rule that a construction of statutes is to be *favored* which gives *concurrent* jurisdiction to *two* bodies. Obviously, there must always be some extra burden in working under two or more agencies of the Federal Government instead of under one. If there be any rule of construction, therefore, it must surely be that that construction is to be favored which relieves the citizen of that *burden*, so long always as there does remain one Federal agency which has jurisdiction.

Expressed affirmatively, the true rule of judicial construction must be that the Congress will be presumed, in the absence of plain language to the contrary, to have in-

tended one Federal agency to have jurisdiction at a time. This rule not merely avoids the oppressions and burdens to which we have referred, but avoids the unseemly consequences of conflicts or races of diligence between two Government agencies acting simultaneously or competitively in the same field.

But we do not ask the Court to decide the case upon any rule of construction. We submit that the true course is an objective examination of the Webb-Pomerene Act.

We suggest that it is impossible to conceive a stronger set of statutory provisions to express the Congressional intention, except only that the statute might conceivably have gone on to say in so many words that the Attorney General shall *not* have jurisdiction until the Federal Trade Commission shall have acted. Thus, at the end, after the words

> "said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper",

the Congress might conceivably have added:

> "and he shall take no action on his own motion until he shall have had such findings and recommendations so referred to him".

But surely it would, to say the least, be a very curious rule that, whenever the Congress is passing an Act on a specific subject and conferring in that very Act a specific limited jurisdiction on the Attorney General, it must nonetheless be deemed to have conferred a conflicting or overriding additional and general jurisdiction on the Attorney General unless it has in so many words said the contrary.

In the Webb-Pomerene Act, the Congress went to the pains of laboriously repeating in the procedural sections, phrase by phrase,—yes, word by word,—all the words and phrases of the substantive section; and in the substantive section it went to the pains of laboriously repeating not merely the words of the substantive provision of the Sherman Act, but even the guiding phrases that had been supplied by this Court and by the Clayton Act in interpreting and clarifying the Sherman Act.

Having done as much, the Congress then spelled out with the utmost precision the designation of the enforcement agencies to whom the responsibility was entrusted; and the Congressional direction as to whether there ought to be any investigation of such charges so far as concerned Webb Act Associations, their acts and agreements, and if there were an investigation, what ought to be its results:

(1) "Whenever *the Federal Trade Commission shall* have reason to believe * * *,

(2) "*it shall* summon such association, its officers, and agents to appear before it,"

(3) "and thereafter *conduct* an investigation into the alleged violation of law.

(4) "Upon investigation, *if it shall* conclude that the law has been violated,

(5) "*it may* make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law.

(6) "If such association fails to comply with the recommendations of the Federal Trade Commission, *said commission shall* refer its findings and recom-

mendations to the Attorney-General of the United States.

(7) "for such action thereon as *he may* deem proper."

Could the Congress have done more?

We agree that the Sherman Act is an act "of general application", but it is equally fitting to recognize that there are a great number of special fields of economic activity to which the Congress may consider that a different, and more mature and modern, economic rule may be applicable. When the Congress has applied such a rule, it has not done so with any idea of "repealing" the Sherman Act, whether "by implication" or otherwise. It has done so for the purpose (1) of providing an exemption from the Sherman Act, and (2) of setting up a governmental administrative body to police the exempted field.

The Sherman Act constituted an incorporation within the Federal law of the old common law principles in favor of free trade. The substantive phrases of the Sherman Act—"restraint of trade", "monopolize or attempt to monopolize"—are so characteristically "of general application" that they provide a broad philosophy of economics. The prevailing political and economic trend since 1890 has been, while preserving that philosophy as the general rule, to recognize any number of specific fields to which a more specific rule is deemed to be appropriate. No longer persuasive are the arguments advanced by the Department of Justice in the Court below:

(1) That old statutes of general application which give effect to the principles of *laissez-faire* are to be

preferred to modern statutes of specific application to particular fields of industry and commerce.

(2) That the true rule of judicial construction is therefore to be that the old general statute is paramount to the new specific statute.

(3) That the way that the Court can accomplish this result will be to phrase its opinion as one to the effect that it finds in the new statute "no language expressly repealing" the old statute. (Govt. brief below, p. 10).

We cannot resist the conclusion that the Attorney General must rest in the end upon a theory that he has some sort of inherent power; alternatively expressed, that one rule is to be applied in deciding whether the rights of individuals to sue under the antitrust acts have been repealed by subsequent legislation and that a different rule is to be applied to the government. The short answer to this is again that when Congress wished a different rule to apply, it knew how to prescribe it. It did so in the proviso to § 16 of the Clayton Act, recently under review by this Court in *Georgia* v. *Pennsylvania Railroad Co., et al.*, where it provided that no person "except the United States" might bring suit in equity for injunctive relief against any common carrier subject to provisions of the Interstate Commerce Act in respect of any matter subject to the jurisdiction of the Interstate Commerce Commission.

In the absence of such a provision in the Webb-Pomerene Act, a decision in favor of the government in this case must necessarily be a decision that any individual person may bring a suit in equity to enjoin those very acts and agreements of Webb export trade associations which the

Congress supposed that it had entrusted to the exclusive primary jurisdiction of the Federal Trade Commission.

The Attorney General's argument thus necessarily strikes at the very roots of the primary jurisdiction doctrine. For the Court to establish a rule in respect of the Webb-Pomerene Act that would enable the Attorney General to sue without awaiting action by the Federal Trade Commission, while forbidding private individuals so to do, would be judicial legislation, and of the worst sort, for it would be judicial legislation in a field in which the Congress has evidenced its capacity (by § 16 of the Clayton Act) to enact its own legislation of just that character when it wished to do so. To avoid the curse of judge-made law, a decision by this Court in favor of the Attorney General in this case must necessarily be construed as a decision in favor of the right of any private person to bring a similar case. That would be to carve the Webb-Pomerene Act out of the application of the primary jurisdiction rule. But if that rule is to have any meaning, it must be a rule of general application. And so we have understood it to be. In effect, this Court has laid down that where there is an express grant of jurisdiction over a subject-matter to a particular federal administrative commission, resort must not be had to the Courts until the plaintiff can show that he has exhausted his administrative remedy.

It might be argued that § 16 of the Clayton Act was itself a dispensation from that rule, in favor of the Attorney General and private persons alike, in all cases other than Interstate Commerce Commission cases. And doubtless this was so, so far as the Sherman Act and the Clayton Act were concerned.

But the Clayton Act was enacted in 1914 and the Webb-Pomerene Act in 1918. § 16 of the Clayton Act was not applicable to the Webb-Pomerene Act, which was not included within the definition of "antitrust laws" in § 1 of the Clayton Act to which § 16 was to apply. The Webb-Pomerene Act makes no distinction between the Attorney General and private persons; and it follows that the primary jurisdiction doctrine must apply to the Webb-Pomerene Act without distinction as between them. If so, it excludes the Attorney General as well as the public.

II

THE DECIDED CASES IN OTHER FIELDS RECOGNIZE THE PRINCIPLES UNDER WHICH THE JURISDICTION OF THE FEDERAL TRADE COMMISSION MUST BE EXCLUSIVE IN THE FIELD ENTRUSTED TO IT BY THE CONGRESS.

The position of the Federal Trade Commission is different from that of any of the other government commissions, in that its dominant function is in the field of the antitrust laws themselves.

All of the other government commissions and bodies have particular limited fields entrusted to their care and guardianship—the national transportation system to the Interstate Commerce Commission; the agricultural interest to the Secretary of Agriculture; radio, telephone, telegraph and other communications to the Federal Communications Commission; coal to the Coal Commission; power to the Power Commission; securities and stock exchanges to the Securities and Exchange Commission; aircraft to the Civil Aeronautic Board; etc. In each field there remains to the

Department of Justice the responsibility of policing the provisions of the antitrust laws against conspiracies and monopolies.

The responsibility of the Federal Trade Commission for the field of export trade is analagous to these particular responsibilities of the other named commissions. But there is this vital difference with the Federal Trade Commission, —that it functions within the general framework of the antitrust laws. Like the antitrust division of the Department of Justice, it is charged, as no single one of the other commissions is charged, with responsibility for protection of antitrust policies *as such*.

The Federal Trade Commission is therefore in a position critically different for the purposes of this type of problem than that of any of the other commissions. On this solid and substantial ground the various decisions which have pricked out the boundary line between the particular functions of the other commissions, on the one hand, and the enforcement of the Sherman Act, on the other hand, become meaningless when sought to be applied to the Federal Trade Commission. The language of the opinions may remain an instructive guide, but only provided that it be constantly borne in mind that their problem was a different one.

It was in harmony with this distinction that the Congress itself drafted the Webb-Pomerene Act in terms so different from those of any of the other Commission acts. In none of the acts under which the various above-named commissions functioned, is there inserted language comparable to that found in the four provisos of the Webb-Pomerene Act and which serve to draw within the scope of that Act itself the broad field of the antitrust laws as such.

The statutes which have covered portions of the general field of the Sherman Act have taken many diverse forms. Indeed, no two have been just alike. The Sherman Act may be analogized to the full moon which in some cases has been covered only to a small extent by the particular statute, leaving its own field of operation nearly at the full, while in other cases the particular statute has covered to so great a degree that only a thin field of operation is left to the Sherman Act comparable to the new moon.

The primary jurisdiction doctrine establishes, that where the Sherman Act is covered, the essential findings must first be made by the particular commission to which Congress has entrusted jurisdiction over the particular Act. That the primary jurisdiction doctrine is operative against the Attorney General as well as against the public, is obvious on principle and is given authority by the actual decision upon that part of the indictment in *United States* v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87, in respect of acts covered by the Interstate Commerce Act.

The problem in any such litigation instituted by the Attorney General under the Sherman Act is to determine whether the subject-matter of the particular case is within that portion of the field of the Sherman Act which has been covered by some particular Act or is outside of it.

In our case, the action is in equity, is under § 1 of the Sherman Act, and relates to alleged agreements made and acts done, in every single instance by the export trade association itself,—either alone, or together with the other defendants. In no single instance alleged in the complaint was the association not a participant. Indeed, the case is a strong one, because in every instance the complaint attributes leadership to the association.

Accordingly, in our case, the primary facts that arise for determination are whether the particular agreement or act was

(i) "done in the course of export trade";

(ii) "not in restraint of trade within the United States";

(iii) "not in restraint of the export trade of any domestic competitor of such Association";

(iv) not an "understanding, agreement, or conspiracy, or * * * act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association"; and

(v) not an "agreement, understanding, or conspiracy, or * * * act which substantially lessens competition within the United States or otherwise restrains trade therein."

The first is distinctive of export trade, and defines as it were the particular field entrusted by the Webb-Pomerene Act to the Federal Trade Commission, in a manner comparable to the delegations of power in other fields to other commissions (e.g. transportation to the Interstate Commerce Commission).

The last four (which we have heretofore referred to as the four "provisos") are entirely different. They do not identify the particular field, but they cover the general field of §1 of the Sherman Act. That section covers, and covers only, a

> "contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States or with foreign nations."

We do not therefore have need in this case to appeal to the doctrine in *Central Transfer Company* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, for although it would be particularly difficult under this complaint to separate an injunction designed to put an end to the conspiracy from an injunction that would affect acts within the jurisdiction of the Federal Trade Commission, there is no occasion to do so, as the present statute entrusts the problem as to the conspiracy itself to the Commission.

The dual function of the Federal Trade Commission—relating to the preservation of antitrust policy generally and to the supervision of export trade particularly, is illustrated by sub-paragraphs (d) and (h) of § 6 of the Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717, 15 U. S. C. § 46) empowering the Commission

> "(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation."

> "(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

These provisions underline the view that the Commission's functions (a) relate broadly to "any" alleged violations of

the antitrust acts, and (b) relate particularly to foreign trade.

We now come to distinguish the case upon which the government placed its principal reliance below and which was the basis of the opinion of the learned District Judge. *United States* v. *Borden Company*, 308 U. S. 188. We will review the case in further detail below, with particular identification of the defendants, but for the present, it will be more helpful to confine our attention to the important question in the case directly material here. This is the question as to whether the statutes which had particular application in that case are comparable to the Webb-Pomerene Act. The *Borden* case was a criminal prosecution by the government for alleged violation of §1 of the Sherman Act. The primary jurisdiction question was raised by demurrer based upon two statutes,—the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 608b) and the Capper-Volstead Act (42 Stat. 388, 7 U. S. C. 291). The Agricultural Marketing Agreement Act was plainly of very limited application,[6] and the important question arose under the Capper-Volstead Act.

[6] "The provisions of the Agricultural Marketing Agreement Act in no way covered the field of the Sherman Act. It made reference only to particular transactions, which although illegal under the Sherman Act, might be legalized by official participation and authorization by the Secretary of Agriculture. Under that Act, agreements were illegal unless approved in advance by the Secretary. Under the Webb Act all export associations are exempted from the Sherman Act until affirmative action is taken by the Federal Trade Commission. In the one case, affirmative action is required as a condition precedent to removing an agreement from the Sherman Act; in the other, affirmative action is required as a condition precedent to making the Sherman Act applicable to the agreement."

(a) The Capper-Volstead Act provides for the formation of agricultural associations. To that extent it is closely comparable to the Webb-Pomerene Act. (b) It does not contain an express provision for exemption from the antitrust laws. It there departs from the Webb-Pomerene Act. (c) Like the Webb-Pomerene Act, it contains a proviso against antitrust violation. (d) But unlike the Webb-Pomerene Act, this is strictly limited, the Capper-Volstead Act saying that:

> "If the Secretary of Agriculture shall have reason to believe that any association monopolizes or restrains trade in interstate or foreign commerce *to such an extent that the price of any agricultural product is unduly enhanced by reason thereof*, he shall serve upon such an association a complaint * * * "

Reference to the italicized portion will show that this provision is limited to one-half of one of the four provisos of the Webb-Pomerene Act (viz. the third, identified last above as item iv). That is, where "the price * * * is enhanced." This did not apply to restraints of trade generally, or even to those restraints which have the effect of depressing prices or have the intent even, without the effect, of enhancing them.

The procedural provision of the Capper-Volstead Act was that if the Secretary should be of opinion that the Association did monopolize or restrain trade to such an extent that the price of a product was unduly enhanced thereby, he was to issue a cease and desist order. Upon request of the respondent Association or in the event of its failure or neglect to obey such order, the Secretary was to file the record in the District Court and to give notice to the At-

torney-General of the filing, whereupon the District Court was to have jurisdiction to affirm, modify, or set aside the order. No reference was made either to criminal proceedings or to any wider civil jurisdiction in the District Court.

Summarizing the comparisons between the Capper-Volstead Act and the Webb-Pomerene Act, and following in sequence the factors that received attention in the opinion of this Court in the *Borden* case, 308 U. S. at p. 206:

First, the Capper-Volstead Act contained no criminal provision at all; and *United States* v. *Borden* was a criminal proceeding. The Webb-Pomerene Act on the other hand shows that Congress expressly directed its attention to criminal proceedings, for the concluding sentence of the procedural § 5 is that:

> "If such Association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

Two points are to be noted: (1) Criminal proceedings are to be undertaken only if the Association fails to comply with the recommendations of the Commission, but (2) the Attorney General is then to have full discretion as to the conduct of the proceedings ("such action thereon as he may deem proper").

At first blush, it may appear surprising that the Webb-Pomerene Act has eliminated criminal proceedings in the absence of the happening of the condition that the association fails to comply with the recommendations of the Commission. But the surprise is removed when one bears in

mind that the scheme of the statute was that the Commission was to have a regular, continuing and close supervision of all of the affairs of all associations.[7] Indeed, no association existed at the time of the statute, and there were therefore no prior violations in respect of which any immunity was given by the statute. All associations were to be subsequently created and under the direct supervision and control, both as to their creation and throughout their lives, by the Commission. It is not surprising that the Congress did not contemplate that under these conditions there was important need for a criminal jurisdiction, except in cases in which the Commission should make the recommendation contemplated by statute "for the readjustment [of an association's business], in order that it may thereafter maintain its organization and management and conduct its business in accordance with law," and the association should then be obdurate and refuse to comply therewith. In such a case, the Commission was directed to withdraw its fostering guardianship from the association and to turn the whole matter over to the Attorney General ("shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper").

---

[7] The intent of the Congress both that the supervision of the Commission shall be close and continuous, and that the statute should itself provide for penalties in such instances as the Congress deemed appropriate to its scheme of regulation, are both evidenced by the further provision in § 5 that upon failure by an association to furnish to the Commission such information as the Commission might require, the Association should "forfeit to the United States the sum of $100 for each and every day of the continuance of such failure."

The considerations that moved this Court in *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 107-8, are applicable here: that the statute

> "* * * is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission * * *. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal."

That decision (by a unanimous Court) was a recent one when the Webb-Pomerene Act was under consideration in the Congress.

Second, the Webb-Pomerene Act, unlike the Capper-Volstead Act, gives express immunity from the Sherman Act. The substantive § 2 of the Webb-Pomerene Act opens with this expression of immunity, as obviously the governing reason for its enactment.

Third, the Webb-Pomerene Act, as we have already noted, covers the whole domestic field of § 1 of the Sherman Act, instead of a limited portion thereof. The Webb-Pomerene Act does not directly cover § 2 of the Sherman Act at all. In our view, that is because such coverage was unnecessary, as monopolization or attempt to monopolize could not occur without at the same time there being an attempt to restrain trade, on the principle that the greater includes the less. But the point is without moment, as a construction of the Webb-Pomerene Act as eliminating

from its purview § 2 of the Sherman Act would simply mean that the Attorney General is left free to institute exclusively § 2 proceedings in respect of export trade associations, their acts and agreements. The present case includes § 1; indeed, it is brought only under § 1.

Recent opinions for this Court have fully reviewed the generally governing principles, and we now will refer briefly to them. *Georgia* v. *Pennsylvania Railroad Co.*, No. 11 Orig. Oct. Term 1944. *McLean Trucking Company* v. *United States*, 321 U. S. 67.

In *Georgia* v. *Pennsylvania R.R. Co.* (slip opinion at p. 11), the Court had occasion to point out that a commission had been given express jurisdiction over a portion of the characteristic Sherman Act territory (mergers and consolidations):

> "* * * Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions 'where applicable to common carriers' under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put

> an end to their activities. * * * Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. * * *"

The Court divided upon the question whether the Commission had under the particular statutory scheme primary jurisdiction to afford adequate relief against an alleged rate fixing combination, but there was no dispute that the statute might have so provided.

Mr. Justice Douglas's opinion is entirely consistent with the principles which we are submitting (slip opinion at pp. 11-12):

> "* * * Regulated industries are not *per se* exempt from the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188, 198 *et seq.* * * * Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States* v. *Borden, supra*, pp. 198, 199."

Our submission is that there is in our case a clear repugnancy, at least *pro tanto* to the full extent of § 1 of the Sherman Act as it bears upon agreements and acts with and of an export trade association, upon which alone this case is sought to be grounded.

In this case the trade-restraining power that is alleged to exist "under the aegis of private parties" (compare *Georgia* v. *Pa. R. R. Co.*, slip op. p. 14), is alleged to exist under the aegis of the Alkali Export Association, Inc., which is a body formed under "Congressional sanction" and with "Government supervision and control", so that the present bill is seeking "to have the Court act in the place of the commission" (compare *id.*). An injunction in this case would run the risk of conflicting with what "the commission might later approve or condone", and thus

"trench on the domain of the Commission" (compare *id.* at p. 15).

Turning to the *McLean Trucking Case*, 321 U. S. 67, it is again illuminating to set against the present case the factors to which the Court directed attention in that case. It is notable that the Congress in the Webb-Pomerene Act was dealing with a similar problem of accommodation of conflicting policies (*id.* 79). The issues as to foreign and domestic commerce were again intertwined (*id.* 77). In that posture the Congress sought the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, and to that end vested an expert administrative body with broad discretion and charged it with the duty to execute stated and specific statutory policies (*id.* 79). It did not empower the Commission to enforce the Sherman Act as such (*id.* 79), but it did carefully provide that after the Commission should have exercised its functions in respect of export trade, the duty of enforcement of the Sherman Act should be referred by the Commission to the Attorney General.

Before 1918 the effort of Congress in the field of foreign commerce, as in the field of domestic commerce, had been directed mainly to the prevention of abuses, and emphasis of the preservation of free competition was part of that effort (*id.* 80-81). The Webb-Pomerene Act added a new and important object to previous foreign commerce legislation, seeking affirmatively to build up a system of export trade associations prepared to handle promptly their share of the foreign commerce of the country (*id.* 81). To that end the policies of the anti-trust laws were to determine the public interest only in a qualified way (*id.* 83). There was an altered emphasis on achieving an adequate,

sufficient and economic system of foreign trade through close supervision of business operations and practices rather than through heavy reliance on the enforcements of free competition (*id.* 83). The origins and legislative history of the Webb-Pomerene Act adequately disclose, as we have pointed out, that in it the Congress recognized there may be occasions when competition in export trade may result in harm to the public as well as in benefit and that when the export inflicts injury upon its rival, it may be the public that ultimately bears the loss (*id.* 83-84).

The Congress was informed that its policy would be furthered by encouraging the organization of stronger units for export (*id.* 85). It in terms relieved participants from the requirements of the antitrust laws and in doing so presumably took into account the facts that the business affected would be subject to the strict regulation of the designated commission (*id.* 85).

In one vital aspect, however, the Webb-Pomerene Act differs from the Motor Carrier Act of 1935. The Motor Carrier Act did not import the general policies of the antitrust laws as a measure of permissibility of the mergers authorized by it (*id.* 85). The Webb-Pomerene Act, on the other hand, imported all the general policies of the antitrust laws, so far as domestic commerce was concerned, within the very framework of the regulation of foreign trade entrusted by it to the Commission. It therefore did what the Motor Carrier Act did not do,—displaced the ordinary function of the Department of Justice and entrusted it in the first instance to the exclusive jurisdiction of the Federal Trade Commission. In other words, all of the factors which favored the sustaining of the position of the Interstate Commerce Commission in the *McLean* case

are present in this case; and there is added to them the further consideration that the Congress showed its faith that the Federal Trade Commission should consider both the particular economic field entrusted to its fostering guardianship (that of export trade) and the *relation* of that field to the other field in which the principles of the antitrust laws were to remain operative.

III

THE INTENT OF THE CONGRESS TO THAT EFFECT FINDS SUPPORT IN THE CIRCUMSTANCES OF THE TIME AND WAS CLEARLY EXPRESSED IN THE DEBATES.

(a)

The surrounding circumstances when the Act was passed.

The action of the Congress in passing the Webb-Pomerene Act must be viewed in the framework of the times when it was passed: The statute was passed during the Winter of 1917-1918, before the campaign that ended the First World War, and at a time when the country was considering the legislative framework in which the anticipated post-war trade should be conducted. Indeed, such problems were remarkably similar to those of today. Thus, specific reference is made in the debates to the prospective competitive power of Great Britain and Germany in post-war markets (*e.g.* Cong. Rec., Vol. 55, Part 3, p. 2785; Vol. 56, Part 4, pp. 3564-3565).

No one could foresee whether co-operation or competition would be the wiser course, and in any event no one could foresee how the rules of the game would work themselves out in practice as applied to the hundreds of separate industries in the country.

What the Congress did conclude, was that this was not an appropriate field for regulation by the sledgehammer method of anti-trust enforcement actions brought by the Attorney General in the District Courts. The Congress was already familiar with the fact that actions of that character are not the most expeditious method as yet designed by man for regulating trade problems. It is true that there had not yet been an *Aluminum* case in which it would require a year in open court for the government's direct case. But there had been the *Standard Oil* and *Tobacco* cases, the total course of which had taken many years; and there was then dragging through the Courts the *Steel* case, which had six years of progress behind it, and (although perhaps the Congress could not exactly predict this) had three more years ahead of it.

But all that we need say is that Congress was entitled to conclude that the institution by the Attorney General of mighty antitrust litigations in the equity courts would not be the best way to regulate the post-war foreign trade of the United States.

An appropriate expression to this effect is found in the remarks of Senator Kellogg, when presenting the Capper-Volstead Act to the Senate in 1922 (Cong. Rec., Vol. 62, Part 2, p. 2050):

> "Mr. President, one of the objections to the Sherman law as applied to these cooperative associations is that any district attorney can go into court and get them indicted, and get them indicted upon a state of facts many times which I defy any lawyer to prove constitutes a monopoly. I spent some years in enforcing the Sherman Antitrust Act, and in some cases, after three or four years of litigation, the Supreme Court, by a divided court, held them illegal, and in other cases, by a divided court,

held them legal, and the farmer is unable to tell, until he reaches the end of an expensive litigation, whether he is breaking the law or not."

In the same speech Senator Kellogg said (at p. 2051):

> "Because the Sherman Act was passed a great many years ago and has done much good is no reason why, as conditions change and we progress in commerce and production, it should not be changed in some respect."

In taking the position that the Congress cannot exclude the Attorney General from activity in any particular field unless it bars him explicity and in so many words, the Department of Justice must be invoking a presumption that the Congress regards litigation in equity as the presumptively right way of enforcing its laws. This may have been Lord Eldon's view. But there has been nothing to indicate that the Congress of the United States has, at least in the current generation, evidenced the same passion for the merits of chancery litigation. It would not be too much to say that of all the modes of administering great commercial affairs that were more familiar to the last generation than to the present, none has suffered more widespread condemnation than the federal suit in equity.

Even stronger, we submit, are the arguments against the use of courts of equity for the administration of *international* trade.

That foreign commerce is an especially appropriate field for the exercise of administrative rather than judicial power, has long been recognized by this Court. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434; *Board of Trustees* v. *United States*, 289 U. S. 48, 57; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Brolan* v. *United*

States, 236 U. S. 216, 218, 222; *Weber* v. *Freed*, 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492.

The Webb-Pomerene Act was passed in 1918 to fill a vital need in that very field, and almost immediately great numbers of trade associations came into existence under the Act. (*Cf.* Final Report of the Executive Secretary to the T. N. E. C., Senate Committee Print, 77th Cong., 1st Sess., p. 101.) From the first, many of the associations engaged in activities of the character under investigation here; yet the Department of Justice never asserted jurisdiction,—and that means not merely during previous administrations, but during the first ten years of the present administration. Such a history is not of course determinative; but it is notable.

(b)

The Congressional Debates and Committee Reports.

The Webb-Pomerene Act was adopted by Congress in April 1918, following a comprehensive report, entitled "Cooperation in American Export Trade", by the Federal Trade Commission in May 1916. The Report said (p. 9):

> "Two chief dangers from cooperative export organizations of American manufacturers and producers are apparent. They may be used to exploit the home market and they may be used unfairly against individual American exporters. These dangers must be faced frankly and provided against fully.
>
> "The Commission is confident that this can be done without sacrificing the essential advantages of joint action and without altering the policy of the antitrust laws or interfering with their enforcement.

> "The only danger to the American consumer would arise if export combinations were to restrain trade in the domestic market. In order to make it difficult for export combinations even to attempt restraint of trade in the United States, the right to cooperate or combine should be limited to the export trade solely, *and administrative supervision should be provided to insure that such organizations are not used surreptitiously for restraining trade at home.* Such provisions of law, with the rigid enforcement of the antitrust acts, will guarantee competitive prices in the domestic market."[8]

Throughout the legislative history of the Webb-Pomerene Act it is evident that Congress intended that such "administrative supervision" should be entrusted to the Federal Trade Commission. It took almost two years after the Commission had submitted its report to Congress for the Webb-Pomerene Act to become law. House Report No. 50 (65th Cong., 1st Sess.), however, accompanying H. R. 2316 which eventually became the Webb-Pomerene Act, pointed out that:

> "A bill similar to this (H. R. 17350) was considered and favorably reported to the House by the Committee on the Judiciary during the Sixty-fourth Congress. It was debated, amended, and passed by the House on September 2, 1916, by a vote of 199 to 25.
>
> "It was then considered in the Senate by the Committee on Interstate Commerce and was favorably reported with amendments to the Senate by that committee on February 15, 1917, but failed to

[8] Italics throughout this brief are supplied unless otherwise indicated.

come to a vote in that body on account of the rush of other business during the closing days of the session.

"Nothing has occurred since the House debated and passed the bill during the last Congress to lessen the necessity of this legislation. Since that time it has received the specific indorsement of President Wilson in his annual address to Congress December 5, 1916."

The relevant paragraph of President Wilson's Address to the Congress (Cong. Rec., Vol. 54, Part 1, pp. 31, 32) was:

"I shall not argue at length the desirability of giving a freer hand in the matter of combined and concerted effort to those who shall undertake *the essential enterprise of building up our export trade*. That enterprise will presently, will immediately assume, has indeed already assumed, a magnitude unprecedented in our experience. We have not the necessary instrumentalities for its prosecution; it is deemed to be doubtful whether they could be created upon an adequate scale under our present laws. *We should clear away all legal obstacles* and create a basis of undoubted law for it which will give freedom without permitting unregulated license. The thing must be done now, because the opportunity is here and may escape us if we hesitate or delay."

The next to last sentence, about clearing away "legal obstacles" and making the law "undoubted", upon the basis of a system of licensing, indicates that the President at least believed that the ordinary judicial processes would not be appropriate to the regulation of export trade, but that it should be put in the hands of a Federal regulatory commission.

A Senate Report (No. 1050, 64th Cong., 2nd Sess.) on H. R. 17350 also made plain that it was intended that the Federal Trade Commission should have exclusive primary jurisdiction to initiate inquiry into the propriety of monopolistic activities of Export Trade Associations. The Report specifically stated (pp. 3-4):

> "Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States, which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, *so that they may determine* whether and to what extent the laws have been violated. For this reason the committee suggests the amendment at the close of section 5, which reads as follows:
>
> > "Wherever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally and unduly enhances prices within the United States of commodities of the class exported by such association, it shall summon such association, its officers, and agents to appear before it and thereafter conduct an investigation into the alleged

violations of law. Upon investigation, if it shall conclude that the law has been violated it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fail to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

"For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'

"This amendment confers upon the Federal Trade Commission full power to investigate and the right to make recommendations to the associations for the readjustment of their business if any law has been violated so that they may thereafter maintain their organization and management and conduct their business in accordance with the law. If the association fails to do so, then the commission is directed to refer its findings and recommendations to the Attorney General for such action as he may deem proper."

The Senate Reports to the 65th Congress, which adopted the Act, were substantially to the same effect (Sen. Reps. 9 and 109, 65th Cong., 1st Sess.).

The debates on the Webb-Pomerene Act also demonstrate that Congress intended that the Federal Trade Com-

mission should have exclusive primary jurisdiction over the Associations. Thus the House of Representatives was advised by Mr. Graham, a member of the Judiciary Committee which recommended adoption of the legislation (Cong. Rec. Vol. 55, Part 4, p. 3570):

> "The bill is intended to enable half a dozen or more men engaged in the same line of business to organize an agency that will handle their product intended for export trade, to be used in that trade alone, and can not in any wise affect the question of prices in this country; and if it does and becomes an element in restraint of trade here or destructive to competition, the saving clauses of the bill will bring the corporation or association offending *under the control of the Federal Commission*, which can dictate the terms by which its business shall be perfected and made unobjectionable; and in case of failure of the corporation to observe those rules, then the offending association is turned over to the Attorney General."

The debates in the Senate are particularly enlightening on the precise issue presented in this case. Senator Pomerene, co-author of the Act, stated in response to a question by Senator Norris (Cong. Rec., Vol. 55, Part 3, p. 2786):

> "Mr. NORRIS. I wish to ask the Senator several questions in regard to the bill. First, will not the effect of the passage of the bill be that what would be illegal, even a crime, if committed with regard to domestic commerce and against our own people at home, would not be illegal if the same thing were done in foreign commerce against foreigners?
>
> "Mr. POMERENE. Mr. President, I think that point has been covered by our Supreme Court. I

do not have before me now the case, but it was in a case involving a contract with respect to bananas, as I remember it, in which it was held that the criminal provisions of the Sherman law did not apply to a contract made with respect to the sale of bananas in foreign countries.

"In further explanation of what the Senator evidently has in mind I refer him to section 4 and the latter part of section 5. I call his attention especially to the last two paragraphs of section 5, *which confer upon the Federal Trade Commission full power over any agreements, transactions, or acts of any of these associations in the foreign trade, and if the commission should find that their agreements, acts, or transactions are violative of the provisions of this bill or, for that matter, of any of our antitrust laws, it can make recommendations for the readjustment of their business, and if they fail to comply with them to make report of their findings and recommendations to the Department of Justice, for their action thereon.*"

At another point, Senator Pomerene said (Cong. Rec., Vol. 55, Part 3, p. 2788):

"Mr. POMERENE. One moment, please, and then I will yield to the Senator from Minnesota—that I think if the Senator from Massachusetts had given some thought to the formulation of a rule which would permit the advocates of this measure to do what it is sought to do, and at the same time make it perfectly clear so as to meet all contingencies, he would realize the task which confronted the committee. *It must be borne in mind that all these agreements, all these acts, all these associations, are under the supervision of the Federal Trade Commission, and that they will be acting as an advisory board in*

the same capacity they now act in our domestic commerce with reference to the evil of unfair competition.

"I dare say that we can cite concrete cases which the Senator and I would at once agree were unfair competition; but it would be utterly impossible for us, and it has been impossible for any lawyer or any court, to give a comprehensive definition of 'unfair competition' which is going to meet every contingency that may arise. *Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.*

"MR. WEEKS. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?

"Mr. POMERENE. It might do that.

"Mr. KELLOGG Mr. President——

"Mr. POMERENE. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose of this bill—I think it is pretty clear, at least it is clear to my own mind, that *the criminal penalties under the Sherman antitrust law would not apply to these foreign contracts or associations.*"

In the light of this statement of the Senator's, it must be apparent that all that he meant when he said "it might do that" was that the Department of Justice might bring a proceeding wrongly and without authority (just as we argued that it has done). That this was what he had in

mind is shown not merely by the above-quoted conclusion of his remarks, but by the context of the question that was put to him by Senator Weeks: assuming that Congress takes a certain view and the Commission agrees, what assurance has the Commission that the Department of Justice will not take a different view?

Senator Pomerene also stated (Cong. Rec., Vol. 55, Part 7, p. 7326):

> "It is to a desire to set aside these doubts, to give a certain amount of reassurance to those who are seeking foreign trade, that we owe the origin of this bill. I think that when the Senator carefully reads the bill he will find that we have not in anywise affected the operation of the Sherman law, so far as it relates to intraterritorial or domestic business. It seeks only to make it perfectly clear that these associations may be organized for the sole purpose of our foreign trade. Beyond that we do not care to go; and then *we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission;* and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land—trust laws or others—*then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper.*"

Senator Kellogg, another advocate of the Act in the Senate, expressly covered the issue involved in the present case in his following remarks (Cong. Rec., Vol. 56, Part 1, p. 111):

"So the bill not only protects the competitor in the export trade, *but it gives the Federal Trade Commission jurisdiction over the entire subject.* It provides that—

> "Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally and unduly enhances or depresses prices within the United States of commodities of the class exported by such association, it shall summon such association, its officers—

"And so forth, and gives the Federal Trade Commission power to remedy the evil."

Senator Pomerene also had occasion to say (Cong. Rec., Vol. 56, Part 1, p. 199):

"Mr. POMERENE. Mr. President, the Senator from Iowa has several times made the statement that it was the intention of this bill to repeal the Sherman antitrust law in so far as it applies to our foreign trade. I submit to the Senator that that overstates the purpose of the bill. *We are very careful in this bill to provide that where restraint is due to unfair methods of competition they will be subject to control by the Federal Trade Commission, and also they have the power after investigation to refer these matters to the Department of Justice for such action as that department may deem proper.*

It is true it authorizes combination and associations, and to that extent it does repeal the act, but it does not permit the use of any unfair method of competition in the way of interfering with the foreign trade."

Finally, Senator Pomerene concluded (Cong. Rec., Vol. 56, Part 1, p. 170):

"So that, I conclude from the principle laid down in this case, although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its trust laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice.

"These associations are placed under vigorous supervision by the departments. In section 5 of the law they are required to register annually with the Federal Trade Commission, giving, among other things, their location, the names of the companies and corporations or individuals or partnerships that may be interested in them, the kind of business they are doing, copies of their charters, if any, or their articles of agreement forming the association; and later on, if the Federal Trade Commission at any time has reason to believe that they are violating any of the laws of the land, the commission can compel them to bring before them all of their books, all of their contracts, and everything pertaining to their business for their investigation; and it is made the duty of the Department of Justice, as well as the United States district attorneys, to see to the enforcement of this law.

"These associations, as shown in section 2 of the bill, must not be in restraint of trade within the United States or of the trade of a domestic exporter, and their acts must not be such as to artificially or intentionally and unduly enhance or increase prices. *If they do any of these acts or enter into any of these agreements, then the Federal Trade Commission has the right to inquire concerning them and to make recommendations requiring these associations to conform their business to the requirements of the statute. If they fail to do it, then the proceedings shall be certified over to the Department of Justice for such action as it may deem proper.* * * *"

No member in either the Senate or the House took issue with the foregoing observations as to the respective jurisdictions of the Federal Trade Commission and the Department of Justice. The Congress thus plainly recognized that the Federal Trade Commission had the expert knowledge necessary to administer the Webb-Pomerene Act properly. All were agreed (1) that the provisos would suffice to keep the substantive provisions of the Sherman Act in full force and effect for the protection of domestic trade and American exporters, but (2) that the policy of enforcing such substantive provisions against Export Trade Associations would be in the hands of an administrative agency and that Court proceedings were only to be resorted to after that agency had sent the case over to the Attorney General.

This has also been the interpretation by the Department of Commerce. In the pamphlet issued in November 1935 by the Department of Commerce (Bureau of Foreign and Domestic Commerce) entitled "The Export Trade Act", the following appears at page 1:

"Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.

"If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. Only upon failure to comply with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. E. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL

Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT

Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

April 4, 1945.